

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34434

EDWIN EVERETT KIMBALL,)	2009 Unpublished Opinion No. 560
)	
Petitioner-Appellant,)	Filed: August 6, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

Order summarily dismissing successive application for post-conviction relief, affirmed.

Edwin Everett Kimball, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Edwin Everett Kimball appeals from the district court's order summarily dismissing his successive application for post-conviction relief. For the reasons set forth below, we affirm.

In 1993, Kimball was found guilty of and sentenced for two counts of rape, first degree kidnapping, aggravated assault, and battery with intent to commit a serious felony along with an enhancement. Kimball did not file a direct appeal. Kimball filed an application for post-conviction relief in 1994. Following an evidentiary hearing, the district court denied Kimball's application, and this Court affirmed that denial on appeal. *See Kimball v. State*, Docket No. 24009 (Ct. App. April 2, 1998).

In June 2006, Kimball filed a successive application for post-conviction relief along with a request for court-appointed post-conviction counsel. The district court entered an order granting Kimball's request for counsel and notified Kimball of its intent to summarily dismiss

his successive application. Kimball did not respond and the district court summarily dismissed Kimball's successive application. Kimball appeals.

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

Kimball filed an initial post-conviction application in June 1994. The district court held an evidentiary hearing on that application and subsequently denied Kimball relief. Kimball appealed and this Court affirmed the district court's denial of Kimball's application.

Kimball filed his successive post-conviction application and a request for appointed counsel in June 2006. The district court granted Kimball's request for post-conviction counsel and notified Kimball of its intent to summarily dismiss his successive post-conviction application. The district court gave four bases for summarily dismissing Kimball's application--the application was untimely; Kimball's claims were finally adjudicated or could have been raised in his initial application; the application was bare and conclusory; and the application named an incorrect respondent. The district court's order gave Kimball and his counsel one month to respond on the timeliness issue or to raise the existence of a genuine issue of material fact. Kimball's counsel mailed the district court a letter stating that she had received the order appointing her to Kimball's post-conviction case, that she had reviewed Kimball's file, and that "Mr. Kimball has nothing further to add to his already submitted Petition for Post Conviction Relief." Almost a year after the letter was submitted, the district court entered an order summarily dismissing Kimball's successive application in its entirety.

On appeal to this Court, Kimball submitted a pro se brief and reply brief. As noted by the state, neither Kimball's brief nor his reply brief claims "error in the district court's dismissal of his petition for failing to comply with the statute of limitations or because the petition is improperly successive." Kimball continues to argue and set forth facts concerning ineffective assistance of trial counsel, excessive sentences, and record and transcript issues. Kimball, however, has not argued that the district court erred in dismissing his application because it was untimely or improperly successive. *See Rios-Lopez v. State*, 144 Idaho 340, 344 n.1, 160 P.3d 1275, 1277 n.1 (Ct. App. 2007) (noting that a defendant waives an issue on appeal if either argument or authority are lacking). Therefore, Kimball has waived any issue that the district court erred in summarily dismissing his successive application for post-conviction relief. He has

also failed to show any reversible error by the district court's dismissal. Accordingly, the district court's order summarily dismissing Kimball's successive application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**